Supreme Court, U.S.
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No. 00-1689

IN THE
Supreme Court of the United States

AT&T COMMUNICATIONS OF THE SOUTHWEST, INC.,
Petitioner,

v.

SOUTHWESTERN BELL TELEPHONE COMPANY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

RESPONSE OF SOUTHWESTERN BELL TELEPHONE COMPANY

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8 pp

QUESTION PRESENTED

Whether the court of appeals erred in holding that the FCC's rules for calculating the prices for interconnection and access to unbundled network elements are unlawful because those rules assume, among other things, a network that at all times is optimally efficient in both its configuration and use of technology.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, respondent Southwestern Bell Telephone Company states the following:

Southwestern Bell Telephone Company is a wholly owned subsidiary of SBC Communications Inc. (formerly Southwestern Bell Corporation), a publicly held company. SBC Communications Inc. has no parent corporation. No publicly held company has a 10 percent or greater ownership interest in SBC Communications Inc.

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Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 1

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RESPONSE OF SOUTHWESTERN BELL TELEPHONE COMPANY

This case presents an issue that this Court has already agreed to decide in *Verizon Communications Inc. v. FCC*, No. 00-511 (and consolidated cases). Accordingly, respondent Southwestern Bell Telephone Company does not oppose AT&T's request that the Court hold its petition pending disposition of that related matter.

1. In *Iowa Utilities Board v. FCC*, 219 F.3d 744 (8th Cir. 2000) ("*Iowa Utilities Board II*"), the Eighth Circuit held that the FCC's "total element long-run incremental cost" (or "TELRIC") methodology for determining rates for interconnection and access to unbundled network elements is contrary to the Telecommunications Act of 1996 (the "1996 Act"). The Eighth Circuit stated that the FCC's methodology improperly ignored "the actual facilities and equipment" in the

incumbent's network in favor of a hypothetical, perfectly efficient network. *Id.* at 751.

In the *Verizon Communications* matter, this Court granted petitions filed by the FCC, AT&T, and others requesting that the Court review whether that Eighth Circuit determination is lawful. *See Verizon Communications Inc. v. FCC*, 121 S. Ct. 877, 877-79 (2001). Additionally, in response to a joint petition filed by Verizon, Southwestern Bell, and other incumbent local exchange carriers, the Court also agreed to decide whether the Eighth Circuit erred in upholding the FCC's refusal to permit incumbents to recoup their actual, historical costs. *See id.* Briefing is nearing completion in those cases, and argument is scheduled for October 10, 2001.

2. This case arises from the Missouri Public Service Commission's ("MPSC") application of the FCC's TELRIC methodology in arbitrating the terms of an interconnection agreement between Southwestern Bell and AT&T. In finding the MPSC's actions unlawful, the Eighth Circuit explicitly relied on its holding in *Iowa Utilities Board II* that TELRIC is inconsistent with the 1996 Act. *See* Pet. App. 5a. The Eighth Circuit declined to address Southwestern Bell's other arguments demonstrating that the MPSC's decision is unlawful regardless of TELRIC's legality. *See id.* at 5a, 6a, 10a.

3. Because this Court is already reviewing the Eighth Circuit's *Iowa Utilities Board II* decision in the *Verizon Communications* cases, Southwestern Bell agrees with AT&T that it would be appropriate for this Court to hold this case pending disposition of that related matter. AT&T is incorrect, however, in asserting that vacatur will be necessary "[u]nless this Court affirms the Eighth Circuit's decision invalidating [the relevant FCC TELRIC rule] in its entirety." Pet. 5. In fact, because all parties agree that the MPSC purported to apply TELRIC (*see* Pet. 4), if TELRIC is unlawful in *any* respect, the Eighth Circuit's result would be correct and there will be no

need for vacatur. Only if the Court finds TELRIC to be wholly lawful would there be any reason for the Court to vacate the Eighth Circuit's decision and remand for reconsideration. Even in that instance, moreover, the Eighth Circuit would be free on remand to invalidate the MPSC's determinations based on the other arguments that Southwestern Bell has raised in this case.

CONCLUSION

For the foregoing reasons, respondent Southwestern Bell does not oppose AT&T's request that its petition for certiorari be held pending the Supreme Court's resolution of *Verizon Communications*.

Respectfully submitted,

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